

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

EVANS & KORTH,
a Washington general partnership comprised
of Sarajane Evans and William M. Korth, dba
With Love Chocolates,

Plaintiff,

v.

OH NUTS OF MONSEY, INC. a New York
corporation,

Defendant.

CASE NO. 3:17-cv-5468

**COMPLAINT FOR TRADEMARK
INFRINGEMENT, TRADEMARK
COUNTERFEITING, FALSE
DESIGNATION OF ORIGIN, UNFAIR
COMPETITION, AND EQUITABLE
RELIEF**

Plaintiff alleges:

PARTIES

1. Plaintiff, Evans & Korth, dba WITH LOVE CHOCOLATES, is a Washington general partnership with its principal place of business at 711 South 48th Street, Tacoma, Washington 98408 (Evans & Korth).

2. Oh Nuts of Monsey, Inc., is a New York corporation, with a principal place of business at 68 RT 59, Monsey, New York 10952 doing business as “Oh! Nuts” (Oh! Nuts).

JURISDICTION AND VENUE

3. Oh Nuts of Monsey, Inc. is subject to the jurisdiction of this Court which arises under: (i) the Trademark Laws of the United States, 15 U.S.C. §§ 1051 *et seq.* Jurisdiction is conferred by 15 U.S.C. § 1121 and 28 U.S.C. § 1331. This Court has subject matter jurisdiction over this action under 28 U.S.C. §§ 1331, 1338 and 1400(b) and supplemental or pendant jurisdiction over the remaining claims under 28 U.S.C. §§ 1367(a) and 1332; and (ii) diversity of citizenship jurisdiction under 28 U.S.C. § 1332 as the parties are citizens of different states and the amount in controversy exceeds \$75,000.

4. Venue is proper in this Court under 28 U.S.C. § 1391(b) and (c) in that a substantial part of the property that is the subject of the action is situated in this District as the Defendant is promoting, distributing and selling branded goods in this District that infringe the trademarks of Plaintiff.

FACTS

5. On or around June 20, 2009, Evans & Korth acquired the business and goodwill of Lemberger Candy Corp. which included its trademarks, trade dress and chocolate candy products.

6. Evans & Korth is the owner of record for the following U.S. Trademark Registrations:

Mark	Serial No.	Reg. No.
CHOC-AID	75551238	2263281
GUMMY-AID	75446988	2252030
FOR LIFES BOO BOOS	86949416	5068416
Gummy piece design	86949373	5085650
Chocolate piece design	86949322	5085649

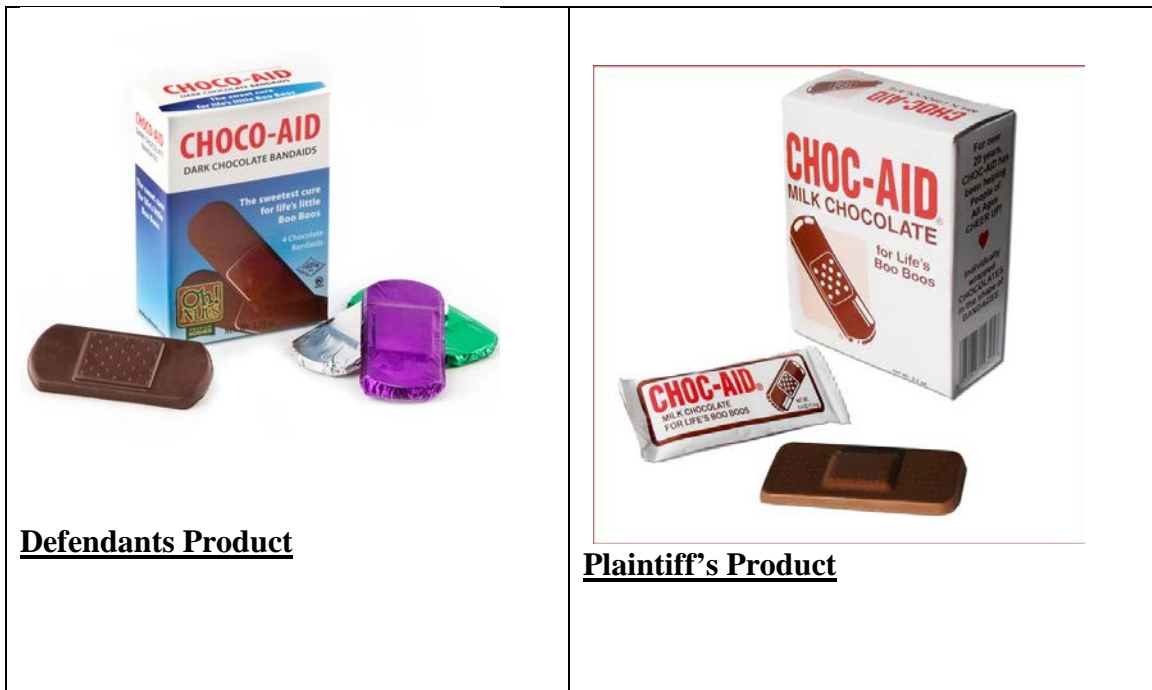
Copies of the foregoing Registration Certificates are attached hereto as Exhibits A through E.

7. Plaintiff, or its predecessor, Lemberger Candy Corp., have continually used the

CHOC-AID and three-dimensional molded chocolate bandage candy piece design in commerce and in commerce governed by the Congress since as early as October 1989 and the mark is presently being used on or in connection with the sale of chocolate candy.

8. Plaintiff's trademarks are valid and enforceable and have not been abandoned.

9. Defendant is doing business throughout the United States, in the state of Washington and this District selling a chocolate candy product under the mark CHOCO-AID, which infringes Plaintiff CHOC-AID mark, U.S. Tm Reg. No. 2,263,281 and by selling chocolate pieces in the form of a molded chocolate bandage that is either identical or nearly identical to Plaintiff's three-dimensional molded chocolate bandage design which is registered under U.S. Tm. Reg. No. 5,085,649. Defendant's packaging, is nearly identical to plaintiff's packaging.



FIRST CLAIM FOR RELIEF **(Infringement of Registered Trademark)**

10. Plaintiff realleges and incorporates the allegations set forth in paragraphs 1 through 9 above.

1 11. Registration of Plaintiff's trademarks on the Principal Register of the United States
2 Patent and Trademark Office are prima facie evidence of the validity of the registered mark and
3 of the registration of the mark, of the owner's ownership of the mark, and of the owner's exclusive
4 right to use the registered mark in commerce on or in connection with the goods or services
5 specified in the certificates. 15 U.S.C. § 1057(b).
6

7 12. Defendant has and continued to use without license or permission CHOCO-AID
8 and the three-dimensional molded chocolate bandage candy piece design on or in connection
9 with chocolate candy. Please see [https://www.ohnuts.com/buy.cfm/choco-aid-dark-chocolate-](https://www.ohnuts.com/buy.cfm/choco-aid-dark-chocolate-bandage-box)
10 [bandage-box](https://www.ohnuts.com/buy.cfm/choco-aid-dark-chocolate-bandage-box).
11

12 13. Defendant's unauthorized continued use of the plaintiff's trademark on or in
13 connection with chocolate candy is likely to cause confusion because the relevant consuming
14 public is likely to believe that Defendant's goods emanate from, are sponsored by, or are
15 authorized by Plaintiff.
16

17 14. Defendant has and has had knowledge of Plaintiff's prior use and registration of
18 Plaintiff's trademarks for chocolate candy, but, nevertheless, has used and continues to use
19 Plaintiff's trademarks without authorization and in disregard of Plaintiff's rights.
20

21 15. Defendant's infringement of Plaintiff's trademark was and is willful with the intent
22 of trading on Plaintiff's goodwill and reputation.

23 16. Defendant's sale of CHOCO-AID on and in connection with the three-dimensional
24 molded chocolate bandage design is counterfeit.

25 17. On information and belief, Defendant has profited from the unauthorized use of
26 Plaintiff's trademarks.
27

28 18. Plaintiff has suffered the loss of sales and profits that Plaintiff would have made

1 but for Defendant's acts.

2 19. Defendants acts of infringement and willful and counterfeit, make this case
3 exceptional.

4 20. The above-described acts of Defendant constitute trademark infringement in
5 violation of 15 U.S.C. § 1114(1)(a). Defendant's actions are willful and the use of CHOC-AID
6 and the three-dimensional molded chocolate bandage design is counterfeit. Plaintiff is entitled
7 to and therefore demands damages under 15 U.S.C. § 1117, enhanced damages for counterfeit
8 use of Plaintiff's trademarks and trade dress, together with costs and attorney's fees.
9

10
11 **SECOND CLAIM FOR RELIEF**
12 **(False Designation of Origin)**

13 21. Plaintiff realleges and incorporates the allegations set forth in paragraphs 1 through
14 20 above.

15 22. Defendant's use of Plaintiff's trademarks and trade dress constitutes false
16 designation of origin in violation of 15 U.S.C. § 1125(a). Defendant has used Plaintiff's
17 trademark in a way that is likely to cause confusion, mistake and deception among the public
18 and trade, all of whom will be led to erroneously believe that Defendant's goods are produced,
19 provided by, authorized by, approved of, or otherwise affiliated or associated with Plaintiff and
20 Plaintiff's products.
21

22 23. On information and belief, in selecting and continuing to use Plaintiff's trademark
23 in connection with its goods, Defendant intends to misrepresent the origin of the goods and to
24 trade on Plaintiff's goodwill and reputation.
25

26 24. Plaintiff has no adequate remedy of law. By misappropriating Plaintiff's
27 trademarks and trade dress, Defendant has irreparably injured and is likely to continue to
28 irreparably injure Plaintiff's business reputation, and Plaintiff is entitled to and therefore requests

1 that a permanent injunction be entered under 15 U.S.C. § 1116. Plaintiff is entitled to and further
2 demands that all infringing goods, all labels, signs, prints, packages, wrappers, receptacles, and
3 advertisements, and all plates, molds, matrices, and other means of making the same shall
4 delivered up and destroyed as permitted by 15 U.S.C. § 1118.
5

6 **THIRD CLAIM FOR RELIEF**
7 **(Unfair Competition RCW 19.86.010 et seq.)**

8 25. Plaintiff realleges and incorporates the allegations set forth in paragraphs 1
9 through 24 above.

10 26. This claim arises under the Washington Consumer Protection Act, RCW
11 19.86.010 et seq. and the common law.

12 27. The acts of Defendant as alleged herein constitute unfair methods of competition
13 and unfair or deceptive acts or practices in the conduct of trade or commerce under RCW
14 19.86.020 in respect to selling, offering to sell and marketing goods under the CHOC-AID and
15 three-dimensional molded chocolate bandage design in the state of Washington. Defendant's
16 violations of the Consumer Protection Act are harmful to the public interest. Defendant's misuse
17 of the Plaintiff's trademarks and trade dress has and has had the capacity to harm other persons.
18

19 28. Because of the foregoing violations of the Consumer Protection Act, Plaintiff has
20 suffered severe and irreparable injury and damages, as well as costs and attorney's fees.
21

22 29. This Court should award Plaintiff injunctive relief as well as an award of damages
23 as determined at trial, which should be trebled in the discretion of the Court, along with costs of
24 suit and Plaintiff's attorney's fees.
25
26
27
28

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays:

A. For permanent injunctive relief pursuant to 15 U.S.C. § 1116;

B. For an award of damages pursuant to 15 U.S.C. § 1117, including Defendant's profits and Plaintiff's lost profits and enhanced damages for counterfeit use of the Plaintiff's trademarks;

C. For an Order directing destruction of all infringing goods, all labels, signs, prints, packages, wrappers, receptacles, and advertisements, and all plates, molds, matrices, and other means of making the same pursuant to 15 U.S.C. § 1118;

D. For an award of damages pursuant to R.C.W. 19.86.020, including enhanced damages as provided therein;

E. For an award of attorney's fees and costs of suit pursuant to 15 U.S.C. § 1117 and R.C.W. 19.86.090; and

F. For such other relief as the Court deems just and equitable.

DATED: June 16, 2017.

By: /s/ Rex B. Stratton
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